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Subcontracting Arbitration: How The Issues Are Decided

Edwin H. Jacobs*

THE PURPOSE OF THIS PAPER is to determine what, if any, particular criteria are currently being used by arbitrators in deciding subcontracting controversies involving labor and management where a contract exists between the parties. The failure of traditional standards in the evaluation of subcontracting controversies has long been evident. The view here taken opposes those standards and indicates that there is a soundly based and readily analyzed common factor, available as a basis for the determination of these disputes.

Historical Background

Subcontracting in this context, used synonymously with *contracting out*, is well defined in *Arbitration and Labor Relations*¹ by Updegraff:

Subcontracting or contracting out as used synonymously in labor relations means making an agreement to have another person (human or corporate) do construction, perform service, or manufacture or assemble products that could be performed by payroll unit employees. The terms are at times misleadingly used to cover transferring work from unit to nonunit employees or to another plant of the employer. Strictly speaking, these last two meanings or uses of the term are inaccurate, but since the changes to which they apply have the effect of taking work from one group of employees and giving it to another, they are included under the area of discussion. Some awards have been made resting on the conclusion that such work was improperly taken from one worker or group and given to another.

Webster defines *contracting out* as to "remove one's self, by contract from an incurred obligation; to send or assign outside a contract," and *subcontracting* as "an agreement to provide a specified part or all of the work and/or materials for the completion of another contract."²

Until 1960, management, in general, had retained the right to subcontract if it had not bargained that right away in specific contract language. Under the retained rights theory this issue was not arbitrable, but was a unilateral prerogative of the company to exercise at its discretion without union interference.³

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¹ C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS*, 324 (3d ed. 1970, Bureau of National Affairs).

² WEBSTER'S UNABRIDGED DICTIONARY (3d ed.).

³ F. ELKOURI and E. ELKOURI, *HOW ARBITRATION WORKS* (rev. ed. 1967, Bureau of National Affairs; Note, *Arbitration and Subcontracting of Labor Disputes*, 19 MAINE L. REV. 55 (1967); Burns, *Management Rights and Subcontracting*, 5 DUQUESNE U. L. REV. 167 (1966); Note, *Standard for Arbitration in Subcontracting Disputes*, 39 IND. L. J. 561 (1964); Barres, *Subcontracting a Persistent Labor Problem*, 18 LAB. L. J. 588 (1967); Baer, *Subcontracting—Twilight Zone in the Management Function*, 16 LAB. L. J. 643 (1965).

After 1960 this approach changed. In the steel trilogy, specifically in *United Steel Workers of America, A.F.L., C.I.O. v. Warrior & Gulf Navigation Co.*,⁵ the United States Supreme Court, *inter alia*, changed the previous contract relationship by encroaching on the former unilateral prerogative of management as to subcontracting, when the court stated:

The grievance alleged that contracting out was a violation of the collective bargaining agreement. There was, therefore, a dispute as to the meaning and application of the provisions of this agreement which the parties had agreed would be determined by arbitration . . . Whether contracting out in the present case violated the agreement is the question. It is a question for the arbitrator and not the courts.⁶

The vehicle for this decision was a subcontracting grievance but the issue was authority of arbitrators as opposed to courts. The resulting erosion was completed in *Fiberboard Paper Products Corporation v. NLRB*⁷ where the United States Supreme Court made subcontracting an obligatory subject for collective bargaining.

The ultimate impact of these decisions was to leave management no sphere in which they were completely independent and it insured jurisdiction to the arbitrator on any subcontracting issue.

In 1959 contracts containing subcontracting clauses were 22 percent of labor agreements covering 34 percent of the employees.⁸ By 1966 the impact of the Supreme Court decisions⁹ is indicated by a subsequent *Department of Labor Bulletin No. 1425-8*, concluding:

Out of 1823 agreements studied, 43.9 percent contained clauses referring to contracting out. Those agreements covered 4.5 million workers or 61 percent of the 7.3 million in the study.¹⁰

Thus, over a period of about five years, in agreements of 1000 workers or more, contracts containing subcontracting clauses doubled, as did the number of employees covered under these agreements.

Having briefly reviewed the history, growth and jurisdiction of arbitration in subcontracting, we turn to the thesis of this paper.

⁴ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The impact of the steel trilogy is discussed by the following: F. ELKOURI and E. ELKOURI, *HOW ARBITRATION WORKS* (rev. ed. 1967, Bureau of National Affairs); C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* (3d ed. 1970, Bureau of National Affairs); FLEMING, *THE LABOR ARBITRATION PROCESS* (1965); PRASAW, *ARBITRATION AND COLLECTIVE BARGAINING* (1970).

⁵ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

⁶ *Id.*

⁷ *Fiberboard Paper Products Corp. v. N.L.R.B.* No. 14, 130 N.L.R.B. 1558 (1964).

⁸ UNITED STATES BUREAU OF LABOR STATISTICS, *SUBCONTRACTING CLAUSES IN MAJOR COLLECTIVE BARGAINING AGREEMENTS*, BULLETIN 1304-1315 (1961).

⁹ Impact of steel trilogy, *supra* note 4.

¹⁰ UNITED STATES BUREAU OF LABOR STATISTICS, *MAJOR COLLECTIVE BARGAINING AGREEMENTS: SUBCONTRACTING*, Bulletin No. 1425-8 (1969).

The following statement by the Elkouris succinctly describes the issue:

The basic and difficult problem is that of maintaining a proper balance between the employer's legitimate interest in efficient operation and effectuating economies on the one hand and the union's legitimate interest in protecting the job security of its members and the stability of the bargaining unit on the other.¹¹

Quite obviously the voluminous document that would be required to include all the contingencies concerning subcontracting in a viable business would be impossible to write or administer. Thus, when a dispute arises an arbitrator decides who is right based on the facts of the particular situation and the contract between the parties.

What outstanding generic criteria for judgment these impartial third parties will use to settle this type of problem is the prime question this paper attempts to answer.

Historically, different authors, including the National Labor Relations Board,¹² have listed standards that they used or felt arbitrators used or should use in deciding the subcontracting issues before them. The Elkouris,¹³ for example, list the following:

1. Past practice
2. Justification—good faith or discrimination
3. Effect on the union—good faith or discrimination against the union
4. Effect on unit employees
5. Type of work involved
6. Availability of properly qualified employees
7. Availability of equipment and facilities
8. Regularity of subcontracting
9. Duration of work subcontracted
10. Unusual circumstances involved
11. History of negotiations on the right to subcontract¹⁴

From 1947 through 1965 over 250 arbitration cases involving subcontracting were reported by the Bureau of National Affairs, the unions winning 30 percent. From 1960 to 1965 of 100 cases arbitrated, 73 decisions were in management's favor. During this period, there emerged no pattern, no criteria to be used.¹⁵

¹¹ F. ELKOURI AND E. ELKOURI, *HOW ARBITRATION WORKS* (rev. ed. 1967, Bureau of National Affairs).

¹² Barres, *Subcontracting a Persistent Labor Problem*, 18 LAB. L. J. 588 (1967).

¹³ F. ELKOURI AND E. ELKOURI, *supra* note 11 at p. 243.

¹⁴ See also lists found in the following: C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* (3d ed. 1970, Bureau of National Affairs); P. PRASAW, *ARBITRATION AND COLLECTIVE BARGAINING* (1970); Note, *Arbitration of Subcontracting of Labor Disputes*, 19 MAINE L. REV. 55 (1967); Burns, *Management Rights and Subcontracting*, 5 DUCESNE U. L. REV. 167 (1966); Note, *Standard for Arbitration in Subcontracting Disputes*, 39 IND. L. J. 561 (1964); Barres, *Subcontracting a Persistent Labor Problem*, 18 LAB. L. J. 588 (1967); Baer, *Subcontracting—A Twilight Zone in The Management Function*, 16 LAB. L. J. 643 (1965).

¹⁵ Note, *Arbitration & Subcontracting Disputes*, 19 MAINE L. REV. 55 (1967).

The arbitrator in *KVP Sutherland Paper Co.*¹⁶ expressed the conclusions very well as follows:

After examining these studies and many of the (subcontracting) decisions discussed, it is fair to conclude that no one, whatever his initial inclinations or prejudices, will go away from them without finding something he likes. Like the town fair, there is something there for everyone.

The analysis done for this paper covers all the subcontracting arbitration disputes published by the Bureau of National Affairs from September 1968 through February 1971 in their *Labor Arbitration Reports*.¹⁷ The number of separate cases covering the subject matter for this period was fifty-one. However, some of the cases had more than one issue.¹⁸ In some instances, one issue was in favor of one party, while another issue in the same case was in favor of the opposing party.¹⁹ The total issues involved in subcontracting was 55; therefore, all percentages and totals are based on the number of issues. There was no particular area of endeavor such as manufacturing or retailing that dominated these cases nor did this have any bearing on the outcome of the cases.

What follows uses the traditional criteria to show the continued confusion created by those standards. Yet, there is a common factor to be found in the majority of these cases. That common factor is the pocketbook impact on the employee.

The company has been successful in 36 of the 55 issues or 65.5 percent, whereas the union succeeded in 19 of the issues or 34.5 percent. There is a slight difference in the percentages compared to that of the 1960 to 1965 period, but not what would appear to be a significant change.²⁰

Union Successes

In analyzing those cases won by the union, the first readily apparent fact is that in nine cases²¹ there was specific language referring directly to the issue of subcontracting or contracting out.

¹⁶ *KVP Sutherland Paper Co.*, 40 Lab. Arb. 737 (1963).

¹⁷ LABOR ARBITRATION REPORTS, Bureau of National Affairs, Vols. 51-55.

¹⁸ *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970); *Air Reduction Co. v. U.M.W. District 50*, Local 12646, 52 Lab. Arb. 40 (1969); *Voluntary Hospitals & Homes of New York v. Drug & Hospital Union Local 1199*, 52 Lab. Arb. 971 (1969).

¹⁹ *Id.*

²⁰ See generally, Note, *Arbitration & Subcontracting Disputes*, 19 MAINE L. REV. 55 (1967) for a discussion of the 1960 to 1965 period.

²¹ *Smith Transport Ltd. v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970); *Bethlehem Steel Corp. v. Steelworkers Local 2600*, 55 Lab. Arb. 705 (1970); *Skelly Oil Corp. v. Oil, Chemical & Atomic Workers Local 5-241*, 55 Lab. Arb. 154 (1970); *United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189*, 54 Lab. Arb. 1207

(Continued on next page)

For example, in *Reading Crane & Hoist Co. v. Steelworkers Local 732*, the contract stated:

... the company shall not contract out any products or services whenever any of its employees who are presently capable of performing the necessary work are on lay off or which will deprive such employees of overtime which they are willing and presently capable of performing.²²

The work in question involved electrical wiring of cranes. The employees doing this production work 10 hours per day and 8 hours on Saturday. The company, with little explanation, unilaterally set 58 hours as the maximum the employees could work. In the arbitration, the company presented no evidence as to efficiency errors or economics to justify their decision and left the arbitrator no choice but to find in the union's favor. Reason, contract language notwithstanding on these facts, should have given the company a favorable decision, but poor preparation and presentation decided the case for the opposing side. It should be noted that the work involved was production work having an economic effect on the bargaining unit.

Similarly in *Pacific Oil Company v. Teamsters Local 526*,²³ there was specific contract language absolutely prohibiting all subcontracting of any nature. Again production work was involved. From reading between the lines in this case, there appeared to be poor relations between the union and management. There was dissatisfaction with a schedule implemented by a new manager, and employee dissatisfaction was not recognized. The employees were working a full 40 hour week and if the work were not contracted out, then the employees would have been required to work overtime.

In the *United States Steel Corporation v. Cement, Lime & Gypsum Workers Local 189*,²⁴ the contract contained a notice clause whereby "all production and maintenance work normally performed" cannot be contracted out without prior notice to the union. Here again, the company case was not properly prepared. The arbitrator in his decision indicated that no supporting evidence was presented to back up the company position. Here too, production work was involved.

Again in *Smith Transport Limited v. Teamsters Local 938*²⁵ (a case with 3 issues, one found for the union and two for the company) the company obviously erred in its original handling of the case and there was specific contract language negating the company action.

(Continued from preceding page)

(1970); *Springday Co. v. Rubber Workers Local 662*, 53 Lab. Arb. 627 (1969); *American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681, District 27*, 53 Lab. Arb. 270 (1969); *Merck & Co., v. Oil, Chemical & Atomic Workers Local 8-86*, 52 Lab. Arb. 243 (1969); *Pacific Oil Co. v. Teamsters Local 526*, 52 Lab. Arb. 172 (1969); *Reading Crane & Hoist Co. v. Steelworkers Local 732*, 51 Lab. Arb. 863 (1968).

²² *Reading Crane & Hoist Co. v. Steelworkers Local 732*, 51 Lab. Arb. 863 (1968).

²³ *Pacific Oil Co. v. Teamsters Local 526*, 52 Lab. Arb. 172 (1969).

²⁴ *United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189*, 54 Lab. Arb. 1207 (1970).

²⁵ *Smith Transport Ltd. v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970).

When there is specific contract language, the parties must abide by their agreement. In these nine cases,²⁶ there was specific language denying the validity of the company action. Of the nine cases, one, *Bethlehem Steel Corp. v. Steelworkers Local 2600*²⁷ was, in my opinion, a wrongly decided case. Of the remaining eight cases, five involved production work for their type of industry.²⁸ Three involved maintenance work.²⁹ In three of the same eight cases, the company case was poorly prepared and presented³⁰ and two of the cases involved both overtime and past practice.³¹

The conclusion to be reached in analyzing these cases is that damage to the bargaining unit with specific contract language and lack of factual proof of the company's position will ensure a union victory.

Of the entire 19 issues listed at the end of this article as won by the union, five of the agreements contained no clause concerning contracting out,³² and thirteen contained some reference specific or general to the subject.³³ One case, *Voluntary Hospitals & Homes of*

²⁶ *Smith Transport Ltd. v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970); *Bethlehem Steel Corp. v. Steelworkers Local 2600*, 55 Lab. Arb. 705 (1970); *Skelly Oil Corp. v. Oil, Chemical & Atomic Workers Local 5-241*, 55 Lab. Arb. 154 (1970); *United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189*, 54 Lab. Arb. 1207 (1970); *Springday Co. v. Rubber Workers Local 662*, 53 Lab. Arb. 627 (1969); *American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681, District 27*, 53 Lab. Arb. 270 (1969); *Merck & Co., Inc. v. Oil, Chemical & Atomic Workers Local 8-86*, 52 Lab. Arb. 243 (1969); *Pacific Oil Co. v. Teamsters Local 526*, 52 Lab. Arb. 172 (1969); *Reading Crane & Hoist Co. v. Steelworkers Local 732*, 51 Lab. Arb. 863 (1968).

²⁷ *Bethlehem Steel Corp. v. Steelworkers Local 2600*, 55 Lab. Arb. 705 (1970). Six years after the employees had stopped doing the work, the company leased the rights to another who was in the process of automating the work. The arbitrator awarded a percentage of back pay, based on the work done, to the employees prior to the completion of the automation while after completion, the lessee was considered the proper party to do the work.

²⁸ *Smith Transport Ltd. v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970); *United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189*, 54 Lab. Arb. 1207 (1970); *Merck & Co. v. Oil, Chemical & Atomic Workers Local 8-86*, 52 Lab. Arb. 243 (1969); *Reading Crane & Hoist Co. v. Steelworkers Local 732*, 51 Lab. Arb. 863 (1968); *Pacific Oil Co. v. Teamsters Local 526*, 52 Lab. Arb. 173 (1968).

²⁹ *Skelly Oil Co. v. Oil Chemical & Atomic Workers Local 5-241*, 55 Lab. Arb. 154 (1970); *American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681, District 27*, 53 Lab. Arb. 270 (1969); *Springday Co. v. Rubber Workers Local 662*, 53 Lab. Arb. 627 (1969).

³⁰ *United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189*, 54 Lab. Arb. 1207 (1970); *Smith Transport Limited v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970); *Reading Crane & Hoist Co. v. Steelworkers Local 732*, 51 Lab. Arb. 863 (1968).

³¹ *Smith Transport Ltd. v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970); *Reading Crane & Hoist Co. v. Steelworkers Local 732*, 51 Lab. Arb. 863 (1968).

³² *Great Atlantic & Pacific Tea Co. v. Meat Cutters Local 408*, 54 Lab. Arb. 1189 (1970); *Air Reduction Co. v. U.M.W. District 50, Local 12646*, 52 Lab. Arb. 40 (1969); *Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437*, 52 Lab. Arb. 901 (1969); *Story Construction Co. v. Teamsters Local 236*, 53 Lab. Arb. 1070 (1969); *West Virginia Pulp & Paper Co. v. Paperworkers Local 675*, 51 Lab. Arb. 842 (1968).

³³ *Bethlehem Steel Corp. v. Steelworkers Local 2600*, 55 Lab. Arb. 705 (1970); *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 705 (1970); *Skelly Oil Co. v. Oil Chemical & Atomic Workers Local 5-241*, 55 Lab. Arb. 154 (1970); *Smith Transport Ltd. v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970); *United States Steel Corp. v.*

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*New York v. Drug & Hospital Union Local 1199*³⁴ was an original contract negotiation and has no bearing on this paper other than for informational purposes.

In the five cases³⁵ containing no clause, some other method of construing the company obligation is found. In *Air Reduction Co. v. UMW District 50, Local 12646*³⁶ the recognition clause was used by the arbitrator to insure that production workers would not be damaged by contracting work out. This case contained two issues, the first as mentioned above was for the union, the second issue was found in the company's favor as it did not involve the bargaining unit employees but required a skill not available within the maintenance part of the unit.³⁷

The cases with no contract clause, if won by the union, must use the above principles as their rationale as do the five cases³⁸ won by the union with no subcontracting clause between September 1968 and February 1971.

The second of these cases, *Story Construction Co. v. Teamsters Local 236*³⁹ had four bargaining unit employees on lay off when work was subcontracted that these workers had done before. Economic damage to the bargaining unit employees through subcontracting while unit employees are on lay off is a situation untenable to all arbitrators. It just cannot be done.

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Cement, Lime & Gypsum Workers Local 189, 54 Lab. Arb. 1207 (1970); American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681 District 27, 53 Lab. Arb. 270 (1969); Merck & Co. v. Oil, Chemical & Atomic Workers Local 8-86, 52 Lab. Arb. 243 (1969); Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 627 (1969); American Standard Inc. v. Electrical Workers I.B.E.W. Local 369, 52 Lab. Arb. 190 (1968); Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 93 (1968); Eastern Airlines Inc. v. Airline Pilots, 51 Lab. Arb. 271 (1968); Pacific Oil Co. v. Teamsters Local 526, 52 Lab. Arb. 173 (1968); Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968).

³⁴ 52 Lab. Arb. 971 (1969).

³⁵ United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189, 54 Lab. Arb. 1207 (1970); Smith Transport Ltd. v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970); Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968).

³⁶ 52 Lab. Arb. 40 (1969).

³⁷ The theory for the use of clauses other than those relating directly to subcontracting is explained in the Note, 39 IND. L. J. 561 (1964). On page 56 the author said: "A large number of arbitrators taking a second approach imply a limitation on the employer's right to subcontract from the recognition, wage rate, job classification or other clauses which might be construed to imply that certain work is to be performed exclusively by the company's employees." At this point the author refers to a series of cases where this has been done. The author goes on: "Many arbitrators . . . imply a limitation on the employer's right to subcontract not from specific clauses but simply from the contractual relationship of the parties," and cites cases to support his contention.

³⁸ Great Atlantic & Pacific Tea Co. v. Meat Cutters Local 408, 54 Lab. Arb. 1189 (1970); Air Reduction Co. v. U.M.W. District 50, Local 12646, 52 Lab. Arb. 40 (1969); Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437, 52 Lab. Arb. 901 (1969); Story Construction Co. v. Teamsters Local 236, 53 Lab. Arb. 1070 (1969); West Virginia Pulp & Paper Co. v. Paperworkers Local 675, 51 Lab. Arb. 842 (1968).

³⁹ 53 Lab. Arb. 1070 (1969).

Again in *Great Atlantic and Pacific Tea Co. v. Meat Cutters Local 408*⁴⁰ bargaining unit employees, specifically production workers, were protected by the arbitrator precluding the company from buying whole chickens which, in effect, would eliminate jobs in the future. This inevitable fact justified the arbitrator's decision. Usually, however, conjecture as to future impact will not be sufficient for the arbitrator to take action in favor of the union.

In *West Virginia Pulp and Paper Co. v. Papermakers & Paperworkers Local 675*⁴¹ the eleven standards suggested by the Elkouris⁴² are discussed. The decision rests with the fourth standard, "effect on unit employees", referring again to production workers.

The fifth case, *Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437*,⁴³ concerns maintenance work that had already been started by the bargaining unit personnel and as such caused them harm when they were relieved of a partially completed assignment.

The remaining five cases,⁴⁴ not mentioned in the text or footnotes, involve the following factors: People on lay off (1 case);⁴⁵ job already started (2 cases);⁴⁶ a future lay off (1 case);⁴⁷ work previously performed by unit employees and hours had been reduced (1 case).⁴⁸ In these last five cases,⁴⁹ one involved production work⁵⁰ and four involved maintenance.⁵¹

In a total then, of the nineteen cases⁵² won by the union, three had contractual language directly on point and the decision was based on language alone.⁵³ One case was wrongly decided⁵⁴ and one⁵⁵ has

⁴⁰ 54 Lab. Arb. 1189 (1970).

⁴¹ 51 Lab. Arb. 842 (1968).

⁴² HOW ARBITRATION WORKS, *supra* note 11.

⁴³ 52 Lab. Arb. 901 (1969).

⁴⁴ *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970); *Springday Co. v. Rubber Workers Local 662*, 58 Lab. Arb. 627 (1969); *Eastern Airlines Inc. v. Airline Pilots*, 51 Lab. Arb. 271 (1968); *Carling Brewing Co. v. Brewery Workers Local 21*, 52 Lab. Arb. 93 (1968); *American Standard Inc. v. Electrical Workers IBEW Local 369*, 52 Lab. Arb. 190 (1968).

⁴⁵ *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970).

⁴⁶ *Carling Brewing Co. v. Brewery Workers Local 21*, 52 Lab. Arb. 93 (1968); *American Standard Inc. v. Electrical Workers IBEW Local 369*, 52 Lab. Arb. 190 (1968).

⁴⁷ *Eastern Airlines Inc. v. Airline Pilots*, 50 Lab. Arb. 271 (1968).

⁴⁸ *Springday Co. v. Rubber Workers Local 662*, 53 Lab. Arb. 627 (1969).

⁴⁹ *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970); *Springday Co. v. Rubber Workers Local 662*, 58 Lab. Arb. 627 (1969); *Eastern Airlines Inc. v. Airline Pilots*, 51 Lab. Arb. 271 (1968); *Carling Brewing Co. v. Brewery Workers Local 21*, 52 Lab. Arb. 93 (1968); *American Standard Inc. v. Electrical Workers IBEW Local 369*, 52 Lab. Arb. 190 (1968).

⁵⁰ *Eastern Airlines Inc. v. Airline Pilots*, 51 Lab. Arb. 271 (1968).

⁵¹ *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970); *Springday Co. v. Rubber Workers Local 662*, 53 Lab. Arb. 627 (1969); *American Standard Inc. v. Electrical Workers IBEW Local 369*, 52 Lab. Arb. 190 (1968); *Carling Brewing Co. v. Brewery Workers Local 21*, 52 Lab. Arb. 93 (1968).

⁵² See list of cases won by the union following this article.

⁵³ See notes 22, 23 and 25.

⁵⁴ *Bethlehem Steel Corp. v. Steelworkers Local 2600*, 55 Lab. Arb. 705 (1970).

⁵⁵ *Voluntary Hospitals & Homes of New York v. Drug & Hospital Union Local 1199*, 52 Lab. Arb. 971 (1969).

no application in the present context. Production work was involved in eleven of these cases,⁵⁶ and maintenance in the remaining seven⁵⁷. The variations could be continued endlessly. The overriding factor concerned with each case is the economic impact on the bargaining unit. In all instances, there was an obvious economic impact on the bargaining unit that pointed out the direction of the decision.

The following simple rules may help those who prepare for subcontracting arbitration in light of the experience indicated by the cases where the union succeeded:

1. Do not violate the pointed language of the agreement.
2. Properly prepare and present the case with facts as to cost and efficiency. Leave no stone unturned as to the arguments presented.
3. Do not subcontract while employees are on lay off.
4. Do not subcontract work already started.
5. Avoid any appearance of immediate or inevitable lay off.
6. Minimize any adverse economic effect on the unit employees.

The above factors appear to be those that have the major influence on any denial of management's rights to subcontract.

To confirm the lack of uniformity, with the exception of economic impact, the following factors were present in these decisions in favor of the union:

1. 12 issues, bargaining unit work having adverse economic impact.⁵⁸

⁵⁶ Bethlehem Steel Corp. v. Steelworkers Local 2600, 55 Lab. Arb. 705 (1970); Great Atlantic & Pacific Tea Co. v. Meat Cutters Local 408, 54 Lab. Arb. 1189 (1970); Smith Transport Ltd. v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970); United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189, 54 Lab. Arb. 1207 (1970); Air Reduction Co. v. UMW District 50, Local 12646, 52 Lab. Arb. 40 (1969); Merck & Co. v. Oil, Chemical & Atomic Workers Local 8-86, 52 Lab. Arb. 243 (1969); Story Construction Co. v. Teamsters Local 236, 53 Lab. Arb. 1070 (1969); Eastern Airlines Inc. v. Airline Pilots, 51 Lab. Arb. 271 (1968); Pacific Oil Co. v. Teamsters Local 526, 52 Lab. Arb. 173 (1968); Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968); West Virginia Pulp & Paper Co. v. Papermakers & Paperworkers Local 675, 51 Lab. Arb. 842 (1968).

⁵⁷ Deere & Co. v. Machinists District 102, 55 Lab. Arb. 377 (1970); Skelly Oil Co. v. Oil, Chemical & Atomic Workers Local 5-241, 55 Lab. Arb. 154 (1970); American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681, District 27, 53 Lab. Arb. 270 (1969); Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437, 52 Lab. Arb. 901 (1969); Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 627 (1969); American Standard Inc. v. Electrical Workers IBEW Local 369, 52 Lab. Arb. 190 (1968); Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 93 (1968).

⁵⁸ Deere & Co. v. Machinists District 102, 55 Lab. Arb. 377 (1970); Great Atlantic & Pacific Tea Co. v. Meat Cutters Local 408, 54 Lab. Arb. 1189 (1970); Smith Transport Ltd. v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970); Air Reduction Co. v. U.M.W. District 50, Local 12646 (1969); Merck & Co. v. Oil, Chemical & Atomic Workers Local 8-86, 52 Lab. Arb. 243 (1969); Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437, 52 Lab. Arb. 901 (1969); Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 270 (1969); Story Construction Co. v. Teamsters Local 236, 53 Lab. Arb. 1070 (1969); American Standard Inc. v. Electrical Workers IBEW Local 369, 52 Lab. Arb. 190 (1968); Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 173 (1968); Eastern Airlines Inc. v. Airline Pilots, 51 Lab. Arb. 271 (1968); West Virginia Pulp & Paper Co. v. Papermakers & Paperworkers Local 675, 51 Lab. Arb. 842 (1968).

2. 11 issues, production work.⁵⁹
3. 9 issues, specifically contract language.⁶⁰
4. 7 issues, maintenance work.⁶¹
5. 5 issues, overtime.⁶²
6. 3 issues, bad presentation by company.⁶³
7. 3 issues, partially completed work subcontracted⁶⁴ while unit employees still working on the project.
8. 3 issues, past practice.⁶⁵

As to contract clauses contained in the agreements, five had no clause,⁶⁶ five had some type of clause,⁶⁷ nine had specific language.⁶⁸

⁵⁹ Bethlehem Steel Corp. v. Steelworkers Local 2600, 55 Lab. Arb. 705 (1970); Great Atlantic & Pacific Tea Co. v. Meat Cutters Local 408, 54 Lab. Arb. 1189 (1970); Smith Transport Ltd. v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970); United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189, 54 Lab. Arb. 1207 (1970); Air Reduction Co. v. U.M.W. District 50, Local 12646, 52 Lab. Arb. 863 (1968); Merck & Co. v. Oil, Chemical & Atomic Workers Local 8-86, 52 Lab. Arb. 243 (1969); Story Construction Co. v. Teamsters Local 236, 53 Lab. Arb. 1070 (1969); Eastern Airlines Inc. v. Airline Pilots, 51 Lab. Arb. 271 (1968); Pacific Oil Co. v. Teamsters Local 526, 52 Lab. Arb. 173 (1968); Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968); West Virginia Pulp & Paper Co. v. Papermakers & Paperworkers Local 675, 51 Lab. Arb. 842 (1968).

⁶⁰ Smith Transport Ltd. v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970); Bethlehem Steel Corp. v. Steelworkers Local 2600, 55 Lab. Arb. 705 (1970); Skelly Oil Corp. v. Oil, Chemical & Atomic Workers Local 5-241, 55 Lab. Arb. 154 (1970); United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189, 54 Lab. Arb. 1207 (1970); Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 627 (1969); American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681, District 27, 53 Lab. Arb. 270 (1969); Merck & Co. v. Oil, Chemical & Atomic Workers Local 8-86, 52 Lab. Arb. 243 (1969); Pacific Oil Co. v. Teamsters Local 526, 52 Lab. Arb. 172 (1969); Reading Crane & Hoist Co. v. Steelworkers Local 732, 51 Lab. Arb. 863 (1968).

⁶¹ Deere & Co. v. Machinists District 102, 55 Lab. Arb. 377 (1970); Skelly Oil Co. v. Oil, Chemical & Atomic Workers Local 5-241, 55 Lab. Arb. 154 (1970); American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681, District 27, 53 Lab. Arb. 270 (1969); Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 627 (1969); Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437, 52 Lab. Arb. 901 (1969); American Standard Inc. v. Electrical Workers IBEW Local 369, 52 Lab. Arb. 190 (1968); Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 93 (1968).

⁶² Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 627 (1969); American Standard Inc. v. Electrical Workers IBEW Local 369, 52 Lab. Arb. 190 (1968); Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 93 (1968); Pacific Oil Co. v. Teamsters Local 526, 52 Lab. Arb. 93 (1968); Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968).

⁶³ United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189, 54 Lab. Arb. 1207 (1970); Smith Transport Limited v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970); Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968).

⁶⁴ Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437, 52 Lab. Arb. 901 (1969); American Standard Inc. v. Electrical Workers IBEW Local 369, 52 Lab. Arb. 190 (1968); Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 93 (1968).

⁶⁵ Smith Transport Ltd. v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970); Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 627 (1969); Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968).

⁶⁶ See note 32.

⁶⁷ Deere & Co. v. Machinists District 102, 55 Lab. Arb. 377 (1970); Voluntary Hospitals & Homes of New York v. Drug & Hospital Union Local 1199, 52 Lab. Arb. 971 (1969); American Standard Inc. v. Electrical Workers IBEW Local 369, 52 Lab. Arb. 190 (1968); Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 93 (1968); Eastern Airlines Inc. v. Airline Pilots, 51 Lab. Arb. 271 (1968).

⁶⁸ See note 21.

Of those cases with specific language, three were poorly prepared by the company⁶⁹ and four were right on point and should never have gone to arbitration.⁷⁰ Yet, excluding *Voluntary Hospitals & Homes of New York v. Drug & Hospital Union Local 1199*⁷¹ as an original contract negotiation and *Bethlehem Steel Corp. v. Steelworkers Local 2600*⁷² for reasons already stated, one finds that the twelve issues⁷³ decided in favor of the union had an adverse economic impact on the unit employees. The conclusions are obvious.

Company Successes

The thirty-six issues won by management⁷⁴ involved, in various combinations, the following factors:

1. 32 issues, no apparent adverse economic impact on bargaining unit employees.⁷⁵
2. 17 issues, maintenance work.⁷⁶

⁶⁹ See note 30.

⁷⁰ *Smith Transport Ltd. v. Teamsters Local 938*, 55 Lab. Arb. 1247 (1970); *American Synthetic Rubber Corp. v. Machinists Kentucky Lodge 681 District 27*, 53 Lab. Arb. 270 (1969); *Pacific Oil Co. v. Teamsters Local 526*, 52 Lab. Arb. 173 (1968); *Reading Crane & Hoist Co. v. Steelworkers Local 7321*, 51 Lab. Arb. 863 (1968).

⁷¹ 52 Lab. Arb. 971 (1969).

⁷² 55 Lab. Arb. 705 (1970).

⁷³ See note 58.

⁷⁴ See appendix, infra.

⁷⁵ *American Air Filter Co. v. Automobile Workers Local 1346*, 54 Lab. Arb. 1251 (1970); *Anderson Hannan Co. v. Iron Workers Local 29*, 55 Lab. Arb. 613 (1970); *Chamberlain Mfg. Corp. v. Machinists Blackhawk Lodge 1318*, 54 Lab. Arb. 1135 (1970); *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970); *International Smelting & Refining Co. v. Steelworkers Local 4985*, 54 Lab. Arb. 657 (1970); *Taylor Publishing Co. v. Lithographers & Photoengravers International, Local 267*, 55 Lab. Arb. 817 (1970); *Air Reduction Co. v. U.M.W. District 50, Local 12646*, 52 Lab. Arb. 40 (1969); *American Sugar Co. v. Longshoremens I.L.A. Local 1660*, 53 Lab. Arb. 1321 (1969); *Arizona Chemical Co. v. Chemical Workers Locals 328 & 694*, 52 Lab. Arb. 1310 (1969); *Bethlehem Steel Corp. v. Steelworkers Local 2602*, 53 Lab. Arb. 993 (1969); *Continental Oil Co. v. Independent Oil Workers of Oklahoma*, 52 Lab. Arb. 532 (1969); *Continental Can Co. v. Papermakers & Paperworkers Local 271*, 53 Lab. Arb. 809 (1969); *Houeg Industries v. Oil, Chemical & Atomic Workers Local 7-87*, 52 Lab. Arb. 1146 (1969); *Joanna Western Mills Co. v. Electrical Workers I.U.E. Local 940*, 52 Lab. Arb. 768 (1969); *Phillips Stamping Co. v. Machinists Local Lodge 2056*, 53 Lab. Arb. 670 (1969); *Pittsburgh Brewing Co. v. Brewery Workers Locals 22, 67 & 144*, 53 Lab. Arb. 470 (1969); *Mead Corp. v. U.M.W. District 50, Local 12943*, 52 Lab. Arb. 345 (1969); *Safeway Store Inc. v. Teamsters Local 315*, 51 Lab. Arb. 1093 (1969); *Schludenberg & Kurdle Co. v. Meat Cutters Local 117*, 53 Lab. Arb. 819 (1969); *Shenango Valley Water Co. v. Utility Workers Local 285*, 53 Lab. Arb. 741 (1969); *Wisconsin Public Service Corp. v. Operating Engineers Local 310*, 52 Lab. Arb. 1028 (1969); *C. Kroger Co. v. Teamsters Local 610*, 52 Lab. Arb. 440 (1968); *Continental Copper and Steel Industries Inc. v. Steelworkers Local 1084*, 51 Lab. Arb. 435 (1968); *Jos. Schlitz Brewing Co. v. Machinists District Lodge 71*, 51 Lab. Arb. 41 (1968); *Kinnear Mfg. Co. v. Steelworkers Local 2074*, 52 Lab. Arb. 37 (1968); *Marquette Mfg. Co. v. Steelworkers Local 6085*, 51 Lab. Arb. 230 (1968); *Mead Corp. v. U.M.W. Local 12943*, 51 Lab. Arb. 593 (1968); *Samuel Bingham Co. v. Rubber Workers Local 558*, 51 Lab. Arb. 575 (1968); *State & Gallagher & Burk, Inc. v. Teamsters Local 291*, 52 Lab. Arb. 297 (1968); *Tenneco Oil Co. v. Oil, Chemical & Atomic Workers Local 4-522*, 51 Lab. Arb. 113 (1968); *Videotape Productions of New York, Inc. v. Electrical Workers I.B.E.W. Local 1212*, 51 Lab. Arb. 600 (1968).

⁷⁶ *American Air Filter Co. v. Automobile Workers Local 1346*, 54 Lab. Arb. 1251 (1970); *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970); *Air Reduction Co. v. U.M.W. District 50, Local 12646*, 52 Lab. Arb. 40 (1969); *American Sugar Co. v. Longshoremens I.L.A. Local 1660*, 53 Lab. Arb. 1321 (1969); *Arizona Chemical Co.*

(Continued on next page)

3. 17 issues, past practice—where the work had been contracted out on previous occasions.⁷⁷
4. 15 issues, normal production work.⁷⁸
5. 12 issues, overtime.⁷⁹
6. 1 issue, substantial economic loss to the company if the work was done in any other manner.⁸⁰

(Continued from preceding page)

- v. Chemical Workers Locals 328 & 694, 52 Lab. Arb. 1310 (1969); Bethlehem Steel Corp. v. Steelworkers Local 2602, 53 Lab. Arb. 993 (1969); Continental Can Co. v. Papermakers & Paperworkers Local 271, 53 Lab. Arb. 809 (1969); Joanna Western Mills Co. v. Electrical Workers I.U.E. Local 940, 52 Lab. Arb. 768 (1969); Mead Corp. v. U.M.W. District 50, Local 12943, 52 Lab. Arb. 345 (1969); Schluderberg & Kurdle Co. v. Meat Cutters Local 117, 53 Lab. Arb. 819 (1969); Shenango Valley Water Co. v. Utility Workers Local 285, 53 Lab. Arb. 741 (1969); Continental Copper and Steel Industries Inc. v. Steelworkers Local 1084, 51 Lab. Arb. 435 (1968); Jos. Schlitz Brewing Co. v. Machinists District Lodge 71, 51 Lab. Arb. 41 (1968); Marquette Mfg. Co. v. Steelworkers Local 6085, 51 Lab. Arb. 230 (1968); Mead Corp. v. U.M.W. Local 12943, 51 Lab. Arb. 593 (1968); Samuel Bingham Co. v. Rubber Workers Local 558, 51 Lab. Arb. 575 (1968).
- ⁷⁷ International Smelting & Refining Co. v. Steelworkers Local 4985, 54 Lab. Arb. 657 (1970); American Sugar Co. v. Longshoremen ILA Local 1660, 53 Lab. Arb. 1321 (1969); Arizona Chemical Co. v. Chemical Workers Local 328 & 694, 52 Lab. Arb. 1310 (1969); Bethlehem Steel Corp. v. Steelworkers Local 2602, 53 Lab. Arb. 993 (1969); Continental Can Co. v. Papermakers & Paperworkers Local 271, 53 Lab. Arb. 809 (1969); Houeg Industries v. Oil, Chemical & Atomic Workers Local 7-87, 52 Lab. Arb. 1146 (1969); Phillips Stamping Co. v. Machinists Local Lodge 2056, 53 Lab. Arb. 670 (1969); Schluderberg & Kurdle Co. v. Meat Cutters Local 117, 53 Lab. Arb. 819 (1969); Shenango Valley Water Co. v. Utility Workers Local 285, 53 Lab. Arb. 741 (1969); Wisconsin Public Service Corp. v. Operating Engineers Local 310, 52 Lab. Arb. 1028 (1969); C. Kroger Co. v. Teamsters Local 610, 52 Lab. Arb. 440 (1968); Jos. Schlitz Brewing Co. v. Machinists District Lodge 71, 51 Lab. Arb. 41 (1968); Mead Corp. v. U.M.W. Local 12943, 51 Lab. Arb. 593 (1968); Safeway Store Inc. v. Teamsters Local 315, 51 Lab. Arb. 1093 (1969); Samuel Bingham Co. v. Rubber Workers Local 558, 51 Lab. Arb. 575 (1968); Stalte & Gallagher & Burk, Inc. v. Teamsters Local 291, 52 Lab. Arb. 297 (1968); Tenneco Oil Co. v. Oil, Chemical & Atomic Workers, Local 4-522, 51 Lab. Arb. 113 (1968).
- ⁷⁸ Anderson Hannan Co. v. Iron Workers Local 29, 55 Lab. Arb. 613 (1970); Chamberlain Mfg. Corp. v. Machinists Blackhawk Lodge 1318, 54 Lab. Arb. 1135 (1970); International Smelting & Refining Co. v. Steelworkers Local 4985, 54 Lab. Arb. 657 (1970); Taylor Publishing Co. v. Lithographers & Photoengravers International, Local 267, 55 Lab. Arb. 817 (1970); Continental Oil Co. v. Independent Oil Workers of Oklahoma, 52 Lab. Arb. 532 (1969); Phillips Stamping Co. v. Machinists Local Lodge 2056, 53 Lab. Arb. 670 (1969); Pittsburgh Brewing Co. v. Brewery Workers Locals 22, 67 & 144, 53 Lab. Arb. 470 (1969); Wisconsin Public Service Corp. v. Operating Engineers Local 310, 52 Lab. Arb. 1028 (1969); C. Kroger Co. v. Teamsters Local 610, 52 Lab. Arb. 440 (1968); Hess Oil & Chemical Corp. v. Teamsters Local 469, 51 Lab. Arb. 752 (1968); Kinnear Mfg. Co. v. Steelworkers Local 2074, 52 Lab. Arb. 37 (1968); Safeway Store Inc. v. Teamsters Local 315, 51 Lab. Arb. 1093 (1969); Stalte & Gallagher & Burk, Inc. v. Teamsters Local 291, 52 Lab. Arb. 297 (1968); Tenneco Oil Co. v. Oil, Chemical & Atomic Workers, Local 4-522, 51 Lab. Arb. 113 (1968); Video Tape Productions of New York Inc. v. Electrical Workers IBEW Local 1212, 51 Lab. Arb. 600 (1968).
- ⁷⁹ Chamberlain Mfg. Corp. v. Machinists Blackhawk Lodge 1318, 54 Lab. Arb. 1135 (1970); International Smelting & Refinery Co. v. Steelworkers Local 4985, 54 Lab. Arb. 657 (1970); Safeway Store Inc. v. Teamsters Local 315, 51 Lab. Arb. 1093 (1969); Phillips Stamping Co. v. Machinists Local Lodge 2056, 53 Lab. Arb. 670 (1969); Wisconsin Public Service Corp. v. Operating Engineers Local 310, 52 Lab. Arb. 1028 (1969); Continental Copper & Steel Industries Inc. v. Steelworkers Local 1084, 51 Lab. Arb. 435 (1968); Hess Oil & Chemical Corp. v. Teamsters Local 469, 51 Lab. Arb. 752 (1968); Marquette Mfg. Co. v. Steelworkers Local 6085, 51 Lab. Arb. 230 (1968); Mead Corp. v. U.M.W. Local 12943, 51 Lab. Arb. 593 (1968); Samuel Bingham Co. v. Rubber Workers Local 558, 51 Lab. Arb. 575 (1968); Tenneco Oil Co. v. Oil, Chemical & Atomic Workers Local 4-522, 51 Lab. Arb. 113 (1968); Videotape Productions of New York Inc. v. Electrical Workers IBEW Local 1212, 51 Lab. Arb. 600 (1968).
- ⁸⁰ Hess Oil & Chemical Corp. v. Teamsters Local 469, 51 Lab. Arb. 752 (1968).

7. 1 issue, bad presentation by the union.⁸¹
8. 1 issue, inevitable bankruptcy of the company under almost any circumstances.⁸²

In these same thirty-six issues, there were contract clauses referring to subcontracting in twenty issues,⁸³ and no contract clauses with direct reference in fourteen issues.⁸⁴ With the exception of clauses right on point, it would appear that contract language has little, if any, impact on the arbitrator's decision.

It is also interesting to note that the ratio of cases poorly prepared over a three year period are 3 to 1 in favor of the union.⁸⁵ When one looks at the percentage figure, the ratio should become appalling to company managements. Almost sixteen percent of the cases lost by management were improperly prepared and presented while less than three percent of the cases won by the company were poorly prepared and presented by the union.

In reviewing the major classifications described above, what facts were involved to indicate no adverse economic impact?

In *Chamberlain Mfg. Corp. v. Machinists Blackhawk Lodge* 1318⁸⁶ there was a notification contract clause which the company failed

⁸¹ *Protective Motor Service Co. v. United Independent Union*, 53 Lab. Arb. 985 (1969).

⁸² *Dutch Mail Bakery v. Bakery & Confectionery Workers Local 25*, 52 Lab. Arb. 588 (1969).

⁸³ *Chamberlain Mfg. Corp. v. Machinists Blackhawk Lodge* 1318, 54 Lab. Arb. 1135 (1970); *Deere & Co. v. Machinists District 102*, 55 Lab. Arb. 377 (1970); *Taylor Publishing Co. v. Lithographers & Photoengravers International, Local 267*, 55 Lab. Arb. 817 (1970); *American Sugar Co. v. Longshoremen ILA Local 1660*, 53 Lab. Arb. 1321 (1969); *Arizona Chemical Co. v. Chemical Workers Locals 328 & 694*, 52 Lab. Arb. 1310 (1969); *Bethlehem Steel Corp. v. Steelworkers Local 2602*, 53 Lab. Arb. 993 (1969); *C. Kroger Co. v. Teamsters Local 610*, 52 Lab. Arb. 440 (1968); *Continental Oil Co. v. Independent Oil Workers*, 52 Lab. Arb. 532 (1969); *Mead Corp. v. U.M.W. District 50, Local 12943*, 52 Lab. Arb. 345 (1969); *Phillips Stamping Co. v. Machinists Local Lodge 2056*, 53 Lab. Arb. 670 (1969); *Pittsburgh Brewing Co. v. Brewery Workers Locals 22, 67 & 144*, 53 Lab. Arb. 470 (1969); *Shenango Valley Water Co. v. Utility Workers Local 285*, 53 Lab. Arb. 741 (1969); *Continental Copper & Steel Industries Inc. v. Steelworkers Local 1084*, 51 Lab. Arb. 435 (1968); *Jos. Schlitz Brewing Co. v. Machinists District Lodge 71*, 51 Lab. Arb. 41 (1968); *Mead Corp. v. U.M.W. District 50, Local 12943*, 52 Lab. Arb. 345 (1969); *Safeway Store Inc. v. Teamsters Local 315*, 51 Lab. Arb. 1093 (1969); *Samuel Bingham Co. v. Rubber Workers Local 558*, 51 Lab. Arb. 575 (1968); *Tenneco Oil Co. v. Oil, Chemical & Atomic Workers Local 4-522*, 51 Lab. Arb. 113 (1968).

⁸⁴ *American Air Filter Co. v. Automobile Workers Local 1346*, 54 Lab. Arb. 1251 (1970); *Anderson Hannan Co. v. Iron Workers Local 29*, 55 Lab. Arb. 613 (1970); *International Smelting & Refining Co. v. Steelworkers Local 4985*, 54 Lab. Arb. 657 (1970); *Continental Can Co. v. Papermakers & Paperworkers Local 271*, 53 Lab. Arb. 809 (1969); *Dutch Mail Bakery & Confectionery Workers Local 25*, 52 Lab. Arb. 588 (1969); *Houeg Industries v. Oil, Chemical & Atomic Workers Local 7-87*, 52 Lab. Arb. 1146 (1969); *Joanna Western Mills Co. v. Electrical Workers I.U.E. Local 940*, 52 Lab. Arb. 768 (1969); *Schludenberg & Kurdle Co. v. Meat Cutters Local 117*, 53 Lab. Arb. 819 (1969); *Wisconsin Public Service Corp. v. Operating Engineers Local 310*, 52 Lab. Arb. 1028 (1969); *Air Reduction Co. v. U.M.W. District 50, Local 12646*, 52 Lab. Arb. 40 (1969); *Hess Oil & Chemical Corp. v. Teamsters Local 469*, 51 Lab. Arb. 752 (1968); *Stalte & Gallagher & Burk, Inc. v. Teamsters Local 291*, 52 Lab. Arb. 297 (1968); *Marquette Mfg. Co. v. Steelworkers Local 6085*, 51 Lab. Arb. 230 (1968).

⁸⁵ See notes 63, 81.

⁸⁶ 54 Lab. Arb. 1135 (1970).

to follow, but all unit employees were working a 48 hour week and more were hired. There was no economic damage to unit employees. In *American Air Filter Co. v. Automobile Workers Local 1346*,⁸⁷ the employee formerly doing landscaping work was transferred to another job and professionals were hired to do his work. No economic loss incurred.

In the two issue case of *Decre & Co. v. Machinists District 102*,⁸⁸ the union won the first issue because some employees were on lay off, but lost the second because the work involved opening, closing and repairing sky lights in a high ceiling twice a year.

In *Tenneco Oil Co. v. Oil Chemical & Atomic Workers Local 4-522*,⁸⁹ the work had been subcontracted, was in progress, and the subcontractor's employees were working the overtime to avoid implementation of a penalty clause. The unit employees grieved only after the contractor started the overtime. Again, no economic loss.

*Kinnear Mfg. Co. v. Steelworkers Local 2074*⁹⁰ had laid off employees subsequent to contracting out production work. However, the influx of orders had caused them to contract the work out. The subcontracting was dispensed with prior to the lay off and the company proved to the arbitrator's satisfaction that a further business decline over which the company had no control, caused the lay off and not the contracting out; therefore, there was in fact no economic loss to unit employees. It would appear that this was a well prepared case presented by the company as the facts indicate it could very easily have gone the other way.

*C. Kroger Co. v. Teamsters Local 610*⁹¹ presented a situation that caused the company to eliminate truck drivers on certain runs. The company showed the favorable economic impact it would have from their point of view. However, the deciding factor was the offer of jobs, even though in another city, to the drivers whose runs had been eliminated. Thus, no economic loss to the employees was caused by the company.

The preceding cases have been detailed to explain the meaning of economic loss.⁹² The issues involved therein concern maintenance, production, and lay off problems, and present a reasonable sample of the problems encountered in subcontracting disputes. More examples would merely be repetitive.

Overtime—Past Practice—Emergencies

Three other problem areas worth mentioning are overtime, past practice, and emergencies. By definition, an emergency needs imme-

⁸⁷ 54 Lab. Arb. 1251 (1970).

⁸⁸ 55 Lab. Arb. 377 (1970).

⁸⁹ 51 Lab. Arb. 113 (1968).

⁹⁰ 52 Lab. Arb. 37 (1968).

⁹¹ 52 Lab. Arb. 440 (1968).

⁹² See notes 86-92.

ciate attention. There is no time for consultation and debate. In the type of emergency contemplated, there very possibly could be detrimental affects on both the company and the bargaining unit employees. In effect, a department or plant shutdown for any given period would cause lost wages and risk of permanent job loss.

In the cases involving overtime,⁹³ the arbitrators uniformly hold that loss of such work does not cause economic loss unless there is contract language so stating, or, in rare instances, there has been a long experience of consistent overtime.⁹⁴ The cases hold that opportunity does not constitute loss, just as anticipated profits for the most part are not collectable.

Examples of the overtime view can be found in *International Smelting & Refining Co. v. Steelworkers Local 4985*⁹⁵ where the arbitrator said that the agreement does not guarantee overtime and the facts showed no other lost work to unit employees. Similarly in *Wisconsin Public Service Corp. v. Operating Engineers Local 310*,⁹⁶ subcontracting was allowed where no employees were on lay off and, in fact, the work force had increased. Similar reasoning is set forth in most of the cases where the union has pleaded overtime in opposing subcontracting.

As the one of a kind cases are not indicative of anything in particular, we come to the final major concern listed for two of the cases⁹⁸—past practice.

Logic rather than issues may best describe the reasoning. This logic is not to be found in the cases, but in summarizing, the conclusion becomes quite clear. Economic detriment is the moving factor. If the work has not been done by the unit in the past, assuming no lay off, then how can the current subcontracting of that work cause a loss? One cannot lose what one has not had, nor agreed to have, whether in whole or in part. Conclusively, even in the case of past practice, the employee's pocketbook decides the issues.

⁹³ *American Air Filter Co. v. Automobile Workers Local 1346*, 54 Lab. Arb. 1251 (1970).

⁹⁴ *American Standard Inc. v. Electrical Workers IBEW Local 369*, 52 Lab. Arb. 190 (1968).

⁹⁵ 54 Lab. Arb. 657 (1970).

⁹⁶ 52 Lab. Arb. 1023 (1969).

⁹⁷ *American Air Filter Co. v. Automobile Workers Local 1346*, 54 Lab. Arb. 1251 (1970).

⁹⁸ See notes 65, 77.

⁹⁹ See notes 58, 75 as they relate to a total of 55 issues listed at the end of this article.

Conclusion

The primary rule that might be suggested to help prepare the union for subcontracting arbitration, in light of the experience indicated by company success, is to find harmful economic impact on the unit employees and plead that point above all others. The clear indication that out-of-pocket losses to employees is the basic and primary criteria used by arbitrators in making their decision is clearly indicated by the fact that 63 percent of the favorable union decisions were based on economics and 89 percent of the favorable company decisions had the same criteria. In total, 80 percent or 44 out of 55 issues were decided on either positive or negative impact of dollars earned by the employees concerned.

A definitive review of the subcontracting cases published by the Bureau of National Affairs for the last three years, indicates there is a clear path being followed. In asking today what particular criteria are used, if any, by arbitrators in deciding subcontracting controversies between labor and management when a contract exists between the parties, one can answer with authority that the overriding factor is the positive, negative or neutral impact the company action has had on the purse of the employees.

A p p e n d i x

Cases Won by the Union

1. Bethlehem Steel Corp. v. Steelworkers Local 2600, 55 Lab. Arb. 705 (1970) (Seward Arbitrator).
2. Deere & Co. v. Machinists District 102, 55 Lab. Arb. 377 (1970) (Sembower Arbitrator).
3. Great Atlantic & Pacific Tea Co. v. Meat Cutters Local 408, 54 Lab. Arb. 1189 (1970) (Britton Arbitrator).
4. Skelly Oil Co. v. Oil, Chemical & Atomic Workers Local 5-241, 55 Lab. Arb. 154 (1970) (Coffey Arbitrator).
5. Smith Transport Limited v. Teamsters Local 938, 55 Lab. Arb. 1247 (1970) (Weatherill Arbitrator).
6. United States Steel Corp. v. Cement, Lime & Gypsum Workers Local 189, 54 Lab. Arb. 1207 (1970) (Duff Arbitrator).
7. American Synthetic Rubber Corp. v. Machinists, Kentucky Lodge 681 District 27, 53 Lab. Arb. 270 (1969) (Kesselman Arbitrator).
8. Merck & Co. v. Oil & Chemical & Atomic Workers Local 8-86, 52 Lab. Arb. 243 (1969) (Crawford Arbitrator).
9. Olin Mathieson Chemical Corp. v. Industrial Workers Allied Local 437, 52 Lab. Arb. 901 (1969) (Amis Arbitrator).
10. Springday Co. v. Rubber Workers Local 662, 53 Lab. Arb. 627 (1969) (Bothwell Arbitrator).
11. Story Construction Co. v. Teamsters Local 236, 53 Lab. Arb. 1070 (1969) (Volz Arbitrator).
12. Voluntary Hospitals & Homes of New York v. Drug & Hospital Union Local 1199, 52 Lab. Arb. 971 (1969) (Cahn Arbitrator).
13. Air Reduction Co. v. U.M.W. District 50, Local 12646, 52 Lab. Arb. 40 (1969) (Shester Arbitrator).
14. American Standard Inc. v. Electrical Workers IBEW Local 369, 52 Lab. Arb. 190 (1968) (Hon. Arbitrator).
15. Carling Brewing Co. v. Brewery Workers Local 21, 52 Lab. Arb. 93 (1968) (Talent Arbitrator).
16. Eastern Airlines Inc. v. Airline Pilots, 51 Lab. Arb. 271 (1968) (Seidenberg Arbitrator).
17. Pacific Oil Co. v. Teamsters Local 526, 52 Lab. Arb. 173 (1968) (Mass. Bd.).
18. Reading Crane & Hoist Co. v. Steelworkers Local 7321, 51 Lab. Arb. 863 (1968) (Crawford Arbitrator).
19. West Virginia Pulp & Paper Co. v. Papermakers & Paperworkers Local 675, 51 Lab. Arb. 842 (1968) (Seinsheimer Arbitrator).

Cases Won by the Company

1. American Air Filter Co. v. Automobile Workers Local 1346, 54 Lab. Arb. 1251 (1970) (Dolnick Arbitrator).
2. Anderson Hannan Co. v. Iron Workers Local 29, 55 Lab. Arb. 613 (1970) (Peterschmidt Arbitrator).
3. Chamberlain Mfg. Corp. v. Machinists Blackhawk Lodge 1318, (Slade 1970) 54 Lab. Arb. 1135 (1970) (Slade Arbitrator).
4. Deere & Co. v. Machinists District 102, 55 Lab. Arb. 377 (1970) (Sembower Arbitrator, two issue case).
5. International Smelting & Refining Co. v. Steelworkers Local 4985, (Cahn 1970) 54 Lab. Arb. 657 (1970) (Cahn Arbitrator).
6. Taylor Publishing Co. v. Lithographers & Photoengravers International, Local 267, 55 Lab. Arb. 817 (1970) (Sartain Arbitrator).
7. Air Reduction Co. v. U.M.W. District 50, Local 12646, 52 Lab. Arb. 40 (1969) (Shester Arbitrator).

8. American Sugar Co. v. Longshoremen ILA Local 1660, 53 Lab. Arb. 1321 (1969) (Cross Arbitrator).
9. Arizona Chemical Co. v. Chemical Workers Locals 328 & 694, 52 Lab. Arb. 1310 (1969) (Blair Arbitrator).
10. Bethlehem Steel Corp. v. Steelworkers Local 2602, (Strongen 1969) 53 Lab. Arb. 993 (1969) (Strongen Arbitrator).
11. Continental Can Co. v. Papermakers & Paperworkers Local 271, 53 Lab. Arb. 809 (1969) (Cahn Arbitrator).
12. Continental Can Co. v. Independent Oil Workers of Oklahoma, 52 Lab. Arb. 532 (1969) (Abernathy Arbitrator).
13. Dutch Maid Bakery v. Bakery & Confectionery Workers Local 25, 52 Lab. Arb. 588 (1969) (King Arbitrator).
14. Houeg Industries v. Oil, Chemical & Atomic Workers Local 7-87, 52 Lab. Arb. 1146 (1969) (Kates Arbitrator).
15. Joanna Western Mills Co. v. Electrical Workers I.U.E. Local 940, 52 Lab. Arb. 768 (1969) (David Arbitrator).
16. Mead Corp. v. U.M.V. District 50, Local 12943, 52 Lab. Arb. 345 (1969) (Lewis Arbitrator).
17. Phillips Stamping Co. v. Machinists Local Lodge 2056, 53 Lab. Arb. 670 (1969) (Nichols Arbitrator).
18. Pittsburgh Brewing Co. v. Brewery Workers Locals 22, 67 & 144, 53 Lab. Arb. 470 (1969) (McDermott Arbitrator).
19. Protective Motor Service Co. v. United Independent Union, 53 Lab. Arb. 985 (1969) (Levy Arbitrator).
20. Safeway Store Inc. v. Teamsters Local 315, 51 Lab. Arb. 1093 (1969) (Kaven Arbitrator).
21. Schluderberg & Kurdle Co. v. Meat Cutters Local 117, 53 Lab. Arb. 819 (1969) (Seidenberg Arbitrator).
22. Shenango Valley Water Co. v. Utility Workers Local 285, 53 Lab. Arb. 741 (1969) (McDermott Arbitrator).
23. Voluntary Hospitals & Homes of New York v. Drug & Hospital Union Local 1199, 52 Lab. Arb. 971 (1969) (Cahn Arbitrator).
24. Wisconsin Public Service Corp. v. Operating Engineers Local 310, 52 Lab. Arb. 1028 (1969) (Larkin Arbitrator).
25. C. Kroger Co. v. Teamsters Local 610, 52 Lab. Arb. 440 (1968) (Doyle Arbitrator).
26. Continental Copper & Steel Industries Inc. v. Steelworkers Local 1084, 51 Lab. Arb. 435 (1968) (Wagner Arbitrator).
27. Hess Oil & Chemical Corp. v. Teamsters Local 469, 51 Lab. Arb. 752 (1968) (Gould Arbitrator).
28. Jos. Schlitz Brewing Co. v. Machinists District Lodge 71, 51 Lab. Arb. 41 (1968) (Bethwell Arbitrator).
29. Kinnear Mfg. Co. v. Steelworkers Local 2074, 52 Lab. Arb. 37 (1968) (Gessinger Arbitrator).
30. Marquette Mfg. Co. v. Steelworkers Local 6085, 51 Lab. Arb. 230 (1968) (Mullin Arbitrator).
31. Mead Corp. v. U.M.W. Local 12943, 51 Lab. Arb. 593 (1968) (Kates Arbitrator).
32. Samuel Bingham Co. v. Rubber Workers Local 558, 51 Lab. Arb. 575 (1968) (Emery Arbitrator).
33. Stalte & Gallagher & Burk, Inc. v. Teamsters Local 291, 52 Lab. Arb. 297 (1968) (Eaton Arbitrator).
34. Tenneco Oil Co. v. Oil, Chemical & Atomic Workers Local 4-522, 51 Lab. Arb. 113 (1968) (Siensheimer Arbitrator).
35. Videotape Productions of New York Inc. v. Electrical Workers IBEW Local 1212, 51 Lab Arb. 600 (1968) (Turkus Arbitrator).